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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH R. DELUCCA, JULIO ENRIQUE PEREZ, JR., and MANUEL POZO, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether a defendant's Fifth Amendment right to due process of law is violated when the Government is permitted to announce its intention of dismissing the charges against other co-defendants in the presence of the jury and then the trial judge formally dismisses the indictment against those co-defendants in the jury's presence?

Whether an attorney-defendant's right to due process of law is violated when an appellate court considers the Canons of Professional Responsibility as a factor in determining that attorney-defendant's level of involvement in a criminal conspiracy?

LIST OF INTERESTED PERSONS

The only persons having an interest in this case are the Petitioners, their families and the United States.

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, JOSEPH R. DELUCCA, JULIO ENRIQUE PEREZ, JR., and MANUEL POZO, respectfully pray that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 10, 1980, and December 24, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, reported as *United States* v. *DeLucca*, 630 F.2d 294 (5th Cir. 1980), appears in the Appendix attached hereto. The Court of Appeals denied the petition for rehearing in a per curiam order dated December 24, 1980, which is also reproduced in the Appendix. The District Court did not render any written opinions specifically directed to this case.

JURISDICTION

The judgement of the Court of Appeals for the Fifth Circuit was entered on November 10, 1980. A timely petition for rehearing was denied without opinion on December 24, 1980. On January 26, 1981, the Fifth Circuit entered its order staying mandate until February 5, 1981, pending the filing of a petition for writ of certiorari and upon timely filing of the certiorari petition, extending the mandate until disposition of the petition. This Court's jurisdiction is invoked under 28 U.S.C.§1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property without due process of law. . .

Title 21, U.S.C. §846.

STATEMENT OF THE CASE

On May 9, 1979, a federal grand jury sitting in the Northern District of Alabama indicted five defendants in connection with a drug conspiracy in Birmingham, Alabama. The defendants were JOSEPH R. DELUCCA, JULIO PEREZ, MANUEL POZO, EMILIO DE LA ROSA, and KENNETH BROWN. Each defendant was charged with one count of conspiracy to distribute cocaine, and two substantive counts of possession with intent to distribute and distribution of cocaine.[1]

A jury trial commenced on August 13, 1979. During the afternoon of the fourth trial day, the government re-

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[1] In violation of 21 U.S.C. §§846 and 841(a)(1), respectively.

quested and was granted a dismissal of its case against co-defendant BROWN. This was done in open court in the presence and hearing of the jury. No objection was interposed by the remaining defendants. The following day, with the jury present in the jury box, the government announced its intention to dismiss all charges pending against DE LA ROSA. This motion was also granted, after which the remaining defendants vehemently moved for a mistrial. DELUCCA's attorney cited as grounds therefor the unusual and irregular manner in which the government chose to dismiss BROWN and DE LA ROSA. This motion was denied and the trial resumed.

After the government rested its case, the court *sua sponte* dismissed the substantive counts against DELUCCA. The jury thereafter found each of the defendants guilty of the charges against them. The facts on which the jury's conviction is based are briefly summarized herein.

During March and April of 1979, Ed Bagley became involved in a drug operation which centered in Miami, Florida. Bagley, out of work and suffering financial difficulties, learned from KENNETH BROWN that a lawyer in Miami, JOSEPH DELUCCA, might be able to provide some assistance (T. 778). DELUCCA, thinking that some of his clients might be able to assist Bagley, agreed to meet with Bagley in Miami. During the initial introduction and meeting, which took place while DELUCCA was driving in his car, Bagley was asked whether he might be willing to take risks, to which Bagley responded that it depended on the type of risk involved (T. 782,962-964). Bagley knew firsthand about risks, having been in the automotive tire business in Birmingham (T. 964).

DELUCCA drove to meet with a client of his, MANUEL POZO, who owned a tire store, as had Bagley

(T.783-784, 959-960). The trio then rode around in DeLucca's car for approximately one hour; it was at this time that Pozo first approached Bagley about selling cocaine in Birmingham (T. 822). DeLucca did not participate in the discussion (T. 979-981). That night, at DeLucca's residence, another discussion of cocaine took place, this time with the addition of Julio Perez. DeLucca, while present, did not participate in any conversations (T. 823,1004-1005). Bagley was given a sample of cocaine to take with him to Birmingham (T. 823,1003).

After returning to Alabama, Bagley telephoned DeLucca to see about working out a sale of tires to South America. DeLucca replied that he had no contacts in South America and consequently could not render assistance (T. 831-832). It was at this time that Bagley met with the Drug Enforcement Administration and agreed to assist the DEA in an investigation, with the understanding that he would be paid for his services (T. 832, 1024). Thereafter, Bagley went back to Miami to arrange a cocaine transaction between Pozo and DEA agents (T. 833-834). Because Pozo could not handle a deal as large as anticipated, Bagley called DeLucca for suggestions. DeLucca arranged for Perez to contact Bagley. During this conversation, no drugs were mentioned; the parties referred to Pozo's deal as involving tires (T. 1135-1136). Perez and Bagley met to discuss arrangements for a small cocaine sale (T. 844).

The small sale was consummated in Birmingham between Perez and two DEA agents on April 15, 1979 (T. 354-362), with Perez exchanging his cocaine for $27,500 (T. 858-859). Three days later, a larger sale involving $250,000 worth of cocaine was finalized. When Perez produced the cocaine, undercover agents arrested him and De La Rosa, a bodyguard (T. 529-531).

On appeal to the United States Court of Appeal for the Fifth Circuit, the defendants raised several issues, only two of which were addressed by the Court. Regarding the propriety of the government's dismissals made in the presence of the jury, the Court stated:

> It should be noted that this circuit has not considered the question of whether the prosecutor's motion to dismiss is unfairly prejudicial to the remaining defendants. Another circuit has addressed this specific situation and concluded that, while the motion should have been made and ruled upon in the absence of the jury, the question of prejudice was addressed to the sound discretion of the trial court. Its failure to grant the motion was not an abuse of discretion. *United States* v. *Barclift,* 514 F. 2d 1073, 1074 (9th Cir. 1975).

630 F. 2d at 298-299. The Court proceeded to hold, however, that the failure of counsel to request a curative instruction, even though an objection was tendered to the trial judge, precluded a finding of reversible error.

On the question of the sufficiency of evidence to support DeLucca's conspiracy conviction, the Fifth Circuit first reviewed the facts of the case to determine DeLucca's level of involvement in the alleged unlawful agreement; then, although expressly disclaiming such, proceeded to impose a new standard by which to determine the culpability of an attorney accused of criminal activity:

> DeLucca, as an attorney, had a high duty to take some affirmative action to defeat or disavow the purpose of the conspiracy before an overt act was committed in furtherance of the conspiracy. *United States* v. *Jimenez*, 622 F. 2d 753, 755 (5th Cir. 1980.) While we do not by this decision create a standard whereby an attorney can be convicted of a

> conspiracy which is lower than the standard for others, it is appropriate to consider the canons of professional responsibility as a factor in determining DeLucca's willing participation in crime.

630 F.2d at 301 (footnote omitted).

REASONS FOR GRANTING THE WRIT

I. A Defendant's Fifth Amendment Right To Due Process Of Law Is Violated When The Government Is Permitted To Announce Its Intention Of Dismissing The Charges Against Other Co-defendants And Then The Trial Judge Formally Dismisses The Indictment Against Those Co-defendants In The Jury's Presence.

Among the most fundamental and revered tenets of criminal law is that which recognizes the absolute right of a defendant to a fair trial. *Brown* v. *United States,* 411 U.S. 223 (1973); *McGautha* v. *California,* 402 U.S. 183 (1971). In order to insure this right, our system of justice has repeatedly emphasized that the guilt of an accused is to be determined on the basis of the evidence introduced against that person, and not by reason of the guilt or innocence of a co-defendant. *E.g., Hudson* v. *North Carolina,* 362 U.S. 697, 702-703 (1960); *United States* v. *Beasley,* 519 F.2d 233 (5th Cir. 1975). This guarantee was, unfortunately, denied the defendants in this case when the jury was permitted to observe the government request a dismissal of all charges against two co-defendants. The prejudicial taint flowing from this conduct was heightened even further when the trial judge, again in the jury's presence, ratified the government's decision that the case against the co-defendants did not warrant prosecution and dismissed the case as to them.

The very obvious impact of this scenario is that the jury was led to believe that the government and the trial court recognized both the lack of culpability on the part of the dismissed co-defendants and, by contrast, the criminal liability of the remaining defendants.[2] This conduct was not only evidence of the prosecution's and court's recognition that the co-defendants were innocent, but also that the evidence against the remaining defendants was sufficient to proceed with the case. Such an expression of belief in the guilt or innocence of those accused of a crime is impermissible. *United States* v. *Diharce-Estrada,* 526 F.2d 637 (5th Cir. 1976); *United States* v. *Barclift,* 514 F.2d 1073 (9th Cir. 1975); *United States* v. *Bess,* 593 F.2d 749 (6th Cir. 1979).

In contrast to the instant decision of the Fifth Circuit, another court has recognized that the precise conduct that occurred in this case constitutes error. In *Unites States* v. *Barclift, supra* at 1074, the Ninth Circuit found that a motion made in open court "to dismiss the case as to one defendant might well have been made and ruled upon in the absence of the jury. . ." However, because the evidence of guilt therein was abundant, the open court dismissal did not require a reversal.

Defense counsel in this case vehemently objected to the tactics utilized by the prosecutor in this case and pointed out the very serious prejudice emanating from that conduct. The trial judge, however, took not even the slightest step to mitigate this prejudice, thus impliedly reaffirming to the jury that these defendants, unlike

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[2] This erroneous impression was further compounded as to DeLucca when, at the close of the government's case, the trial court entered a judgement of acquittal as to the two substantive counts, thereby requiring the jury to deliberate his guilt as to only a single charge.

the co-defendants, were on trial because they were guilty. In *Kotteakos* v. *United States,* 328 U.S. 750, 776 (1946), this court recognized that when it is "highly probable that the error had a substantial and injurious effect or influence in determining the jury's verdict. . ." the proper remedy is a new trial. The Fifth Circuit nevertheless refused to order such appropriate relief, thereby depriving these Defendants of fundamental fairness.

The decision sought to be reviewed is a clear example of a gross miscarriage of justice, involving conduct which could very readily have been avoided. Due process and a fair trial require that juries determine the guilt or innocence of criminal defendants solely on the basis of the evidence, and not on speculation, belief, or the opinions of a judge and prosecutor. This Court should grant certiorari to review this abrogation of a defendant's fundamental right to a fair trial.

II. An Attorney-Defendant's Right To Due Process Of Law Is Violated When An Appellate Court Considers The Canons Of Professional Responsibility As A Factor In Determining That Attorney-Defendant's Level Of Involvement In A Criminal Conspiracy.

In all criminal cases, the government has the responsibility of proving every element of the crime charged beyond a reasonable doubt. *In Re Winship,* 397 U.S. 358 (1970). This burden is not dependent upon the status of the prosecuting authority, *Jackson* v. *Virginia,* 443 U.S. 307 (1979) (due process requires same standard of proof in state criminal proceedings), or the status of the defendant. *In Re Winship, supra* (beyond a reasonable doubt burden is applicable in adult and juvenile prosecutions). Yet, in the present case the Fifth Circuit has im-

posed an altogether new standard of criminal responsibility in situations involving an attorney accused of criminal conspiracy. It is submitted that this new standard is in error.

In order to find a person guilty of criminal conspiracy,

> [t]he government must prove that there was an agreement to accomplish an illegal act. It is not enough for it to merely establish a climate of activity that reeks of something foul.

United States v. *Weischenberg,* 604 F. 2d 326, 331-332 (5th Cir. 1979). While it is certainly true that a lawyer's association with known criminals is distasteful and probably in violation of prevailing ethical standards, that association cannot, and does not, establish criminal liability. *E.g., United States* v. *Melchor-Lopez,* 627 F. 2d. 886 (9th Cir. 1980) (presently pending on rehearing); *Roberts* v. *United States,* 416 F. 2d 1216, 1220 (5th Cir. 1969). The evidence in this case, even as related by the Fifth Circuit, shows merely that attorney *DeLucca* had clients who were involved in criminal activity and at times associated with those clients. At no point did *De Lucca* knowingly or voluntarily participate in the conspiracy or agree with the co-conspirators.

It is respectfully submitted that the opinion in this case directly conflicts with the decision of the same court in *United States* v. *Malatesta,* 590 F.2d 1379 (5th Cir. en banc 1979), which abolished the "slight evidence" rule regarding proof of a defendant's complicity in a conspiracy or scheme. Even assuming a conspiracy existed between the co-defendants, there was no "substantial evidence" connecting DeLucca to the conspiracy. Certainly one's ethical obligations cannot legally and fac-

tually satisfy the required substantial evidence test. Furthermore, the trial testimony from the government's key witness demonstrates that, apart from DeLucca's role as an attorney, his actions constituted nothing more than mere association with the conspirators.

It is respectfully submitted that a writ of certiorari should issue to the Fifth Circuit Court of Appeals to review the opinion filed herein because of the establishment of an impermissible standard of criminal liability imposed upon lawyers. The standard deprives DeLucca of due process of law and must be corrected by this Court.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 1981, three copies of the Petition for Writ of Certiorari were delivered by HAND to the Solicitor General, Department of Justice, Washington, D.C. 20530, and by mail to the United States Attorney, 1800 5th Avenue North, Birmingham, Alabama. I further certify that all parties required to be served have been served.

Neal R. Sonnett

Benedict P. Kuehne

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 79-5542.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOSEPH R. DELUCCA, JULIO ENRIQUE PEREZ, JR. and MANUEL POZO, *Defendants-Appellants.*

Nov. 10, 1980.

Before VANCE and GARZA, *Circuit Judges,* and ALLGOOD*, *District Judge.*

ALLGOOD, *District Judge:*

On May 9, 1979, a federal grand jury sitting in the Northern District of Alabama indicted five defendants in connection with a drug conspiracy in Birmingham. The co-defendants were Joseph DeLucca, Julio Perez, Manuel Pozo, Emilio DeLa Rosa and Kenneth Brown. Each of the defendants was charged with one count of conspiracy to distribute cocaine,[1] and two substantive counts of possession with intent to distribute[2] and distribution of cocaine.[3] A motion to disclose the identity of the government informer was filed by each of the defendants and the United States Magistrate denied the request, stating that the identity of the informer was known to the defendants.

A jury trial commenced on August 13, 1979. During the afternoon of the fourth day of the trial, the government moved to dismiss defendant Brown in the presence and hearing of the jury. The motion was granted without objection from any of the remaining defendants. The following morning, prior to

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* District Judge of the Northern District of Alabama, sitting by designation.

[1] In violation of 21 U.S.C. §846.

[2] In violation of 21 U.S.C. §841(a)(1).

[3] In violation of 21 U.S.C. §841(a)(1).

the resumption of the testimony, with the jury present in the jury box, the government moved to dismiss defendant DeLa Rosa. This motion was also granted, after which DeLucca and the other defendants moved for a mistrial. The defendants' motion was denied and the trial continued as to the remaining defendants.

After the government rested its case, the court *sua sponte* dismissed the substantive counts against DeLucca. The jury, thereafter, found each of the defendants (including DeLucca) guilty of the charges against them. The defendants now appeal their convictions and sentences. Although this appeal raises several issues which merit our serious attention, we can find nothing in the record to indicate that reversible error was committed. Therefore, we affirm the convictions.

I. *Facts*

During March and April of 1979, Ed Bagley became unwittingly involved in an elaborate drug operation, which was centered around the Miami, Florida area. Bagley was having financial difficulty and was desperately in need of a large sum of money. He learned from Kenneth Brown, a friend of his, that a lawyer in Miami by the name of Joseph DeLucca might be able to help him. DeLucca was Brown's brother-in-law and had several clients in and around the Miami area. He agreed to meet with Bagley and arrangements were made for Bagley to fly to Miami.

Around the first of March, 1979, DeLucca met Bagley at the Miami airport. From there, they drove around for about an hour, at which time DeLucca asked Bagley if he would mind taking a risk. The subject was dropped for the time being and they proceeded to meet with a client of DeLucca's, Manuel Pozo. Pozo owned a tire store, as did Bagley in Birmingham. The trio rode around in DeLucca's car for approximately an hour and it was at this time that Pozo first approached Bagley about selling some cocaine in Birmingham. Although Bagley was somewhat nonplussed by the idea, he agreed to continue the discussion with Pozo later on that afternoon.

The meeting failed to materialize, but they were able to discuss the cocaine deal in greater detail that night at DeLucca's home. In addition to the trio, another man, later identified as Julio Perez, was present for the discussion. After being tutored in the specifics of cocaine, Bagley was given a sample to take back to Birmingham with him. It was established at the meeting that the group was interested in negotiating a substantial cocaine transaction in the Birmingham area.

Before boarding a plane back to Birmingham, Bagley threw away the cocaine sample. After returning to Birmingham, he called DeLucca to see about trying to work out a sale of tires to South America. Mr. DeLucca said that he did not know anything about the South American market and, therefore, could not help him. It was at this time that Bagley decided that, rather than enter into the illegal scheme, he would contact the Drug Enforcement Agency (D.E.A.). He did so, and agreed to assist the agency in their investigation of the cocaine operation, with the understanding that he would be paid for his services. Thereafter, Bagley went back to Miami for the purpose of setting up a cocaine transaction between Pozo and D.E.A. agents. A large deal was anticipated, which Pozo could not handle, so Bagley called DeLucca for suggestions. DeLucca arranged for Perez to contact Bagley, because he was better situated to handle larger quantities. Perez and Bagley discussed the specifics of the deal and decided to set up a small sale in Birmingham. This sale was to be followed by a larger one if it proved successful.

The small sale was consummated in Birmingham between Perez and two D.E.A. agents on April 15, 1979. Perez exchanged his sample of cocaine for $27,500.00. Three days later, a larger deal, which involved approximately $250,000.00 worth of cocaine, was arranged. By this time, Perez's bodyguard, DeLa Rosa, had joined him. They met with one of the agents in a Birmingham motel room. When Perez produced the cocaine, he and DeLa Rosa were arrested.

Appellants have raised several questions for our consideration. Two issues which are of particular concern to us are the government's motions to dismiss and the sufficiency of the evidence.

II. *The Government's Motions to Dismiss*

Prior to the start of the afternoon session on the fourth day of the trial, the government requested and was granted a dismissal of its case against one of the defendants — Brown. This was done in open court in the presence and hearing of the jury. No motions were made at that time by any of the remaining defendants and the trial continued on as usual throughout the remainder of the day. The following morning, before testimony was resumed, but again in the presence of the jury, the government moved to dismiss defendant DeLa Rosa. At this time DeLucca's attorney requested a bench conference and moved for a mistrial, citing as grounds the unusual and irregular manner in which the government chose to dismiss Brown and DeLa Rosa. The other defense attorneys joined in this motion, Neither DeLucca's attorney nor any of the other defense attorneys requested that a curative charge be given, maintaining instead that the prejudicial effect caused by dismissing two of the five defendants caused irreparable harm. The experienced trial judge, who had heard all of the evidence up to that time, and was in a position to observe the jury and the overall posture of the case, saw no prejudicial effect on the jury as to the remaining defendants and promptly denied the motion for a mistrial without giving any instruction to the jury.

Defendants argue on appeal that their case was severely prejudiced by the government's actions and that, as a result, it should be reversed. Indeed, there is potential prejudice inherent in the motions to dismiss because of the implications cast upon the defendant's rights. While one person's guilt or innocence may not be used as substantive evidence for the guilt of another, and should not reflect in any way on the question of guilt, the potential nevertheless exists. *See e.g.*,

United States v. *Fleetwood,* 528 F.2d 528, 532 (5th Cir. 1976); *United States* v. *King,* 505 F.2d 602, 607 (5th Cir. 1974); *United States* v. *Baete,* 414 F.2d 782, 783 (5th Cir. 1969). It is not at all uncommon for one or more of multiple defendants to enter guilty pleas during a trial or for the Government to move for dismissal of its case against one or more defendants, as was done here. In fact, the government has a duty to dismiss as to any defendant as soon as it finds that the evidence as to any of the defendants is insufficient to support a conviction. Of course, the dismissal of one or more defendants should not be used by the government in any way to directly or impliedly suggest to the jury that the remaining defendants are guilty. We do not find from the record that the government did anything other than to ask for a dismissal promptly upon making a determination that the evidence was not sufficient to justify a conviction. The court can discern no ulterior motive implicit in the government's motion.

It should be emphasized that because of the defense's trial tactics, they deliberately refused to ask the court for a cautionary jury instruction. The trial judge, in his discretion, could have done so, but declined. Therefore, on appeal, the defendants cannot argue on the one hand that a curative charge could not have ameliorated the situation and on the other that the trial judge should have issued a cautionary statement. Due to the inconsistency of the two arguments and to the defendants' failure to raise objection at the trial, we are permitted to find reversible error only if the substantive rights of the accused were blatantly and severely jeopardized. Fed.R.Crim.P.52(b). Viewed in this context, we will review the questions in two stages: first, with respect to whether a trial judge is always required to issue a curative instruction once the jury learns that a codefendant has been dismissed, and, second, with respect to whether, in this particular case, the failure of the trial court to give one constituted plain error. Because the specific question is one of first impression in this circuit, we address it with caution and dispatch.

The problem of a defendant's guilt by association arises primarily when the jury learns of a codefendant's guilty plea entered either before or during the trial proceedings. A guilty plea entered by a codefendant can be especially prejudicial if the plea is made in connection with a conspiracy to which the remaining defendants are charged. *United States* v. *Medina-Arellano,* 569 F.2d 349, 356 (5th Cir. 1978). This circuit has recommended that when a jury learns of a codefendant's guilty plea, the trial judge should immediately admonish them against transferring the guilt of one to another. *See, United States* v. *King,* 505 F.2d at 607; *United States* v. *Beasley,* 519 F.2d 233, 239 (5th Cir. 1975). A cautionary instruction is generally sufficient to dispel any prejudice that arises from informing the jury of a codefendant's plea of guilty. *United States* v. *White,* 589 F.2d 1283, 1290, n.14 (5th Cir. 1979). However, while a curative statement may be the preferred practice and is an important element in insuring the jury's impartiality, it is but one of the many factors to consider on review. The prevailing inquiry is one of fairness and to this end, jury instructions are important only insofar as they protect the substantive rights of the accused. *United States* v. *King,* 505 F.2d at 607.

It should be noted that this circuit has not considered the question of whether the prosecution's motion to dismiss is unfairly prejudicial to the remaining defendants. Another circuit has addressed this specific situation and concluded that, while the motion should have been made and ruled upon in the absence of the jury, the question of prejudice was addressed to the sound discretion of the trial court. Its failure to grant the motion was not an abuse of discretion. *United States* v. *Barclift,* 514 F.2d 1073, 1074 (9th Cir. 1975).

The cases canvassed in our circuit have involved guilty pleas made during the trial, which present similar, but not identical considerations. Indeed, it would appear that the risk of transferring the guilt is greater when the jury learns that a co-defendant admits his guilt and changes his plea than when the prosecution admits that it lacks sufficient evidence to pro-

ceed against a co-defendant. In the final analysis, however, it is the potential for prejudice and not the method of transmittal that determines the appropriate response. Accordingly, once the fact of a co-defendant's guilt or innocence has been made known to the jury, it is incumbent upon the trial judge to take appropriate corrective action in order to protect the remaining defendants' substantive rights. Immediate jury instructions are but one of the many curative methods at his disposal.

Ordinarily, when the jury learns of a co-defendant's guilt for the same or similar offenses, and the defense counsel does not request that a curative instruction be given, the failure of the trial judge to give one will not require reversal. *United States* v. *Beasley,* 519 F.2d at 240.[4] Only in those rare situations in which other "aggravating circumstances" have exacerbated the prejudice will the failure to give cautionary instructions result in plain and reversible error. *See e.g., United States* v. *Harrell,* 436 F.2d 606, 617 (5th Cir. 1969)(court's conclusion of plain error was specifically predicated upon both aggravating circumstances and the absence of any cautionary instructions, as well as the lack of defense objections). With this in mind, we turn next to the specifics of the case in order to determine whether the trial judge's failure to charge the jury concerning the prosecution's motions to dismiss constitutes reversible error.

As we have pointed out, in assessing the need for a curative instruction once the jury learns of a co-defendant's dismissal, the judge must consider many factors. Among them are the way in wnich the dismissal is brought to the jury's attention, the purpose and motivation for doing so, the emphasis placed on the co-defendant's dismissal relative to the

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[4] A review of this circuit's decisions on charges of plain error where the fact of a co-conspirator's guilty plea was made known to the jury but unaccompanied by a cautionary instruction is found in *United States* v. *King,* 505 F.2d at 607, n.8, and *United States* v. *Fleetwood,* 528 F.2d at 532, n.6.

substantive aspects of the case, and the defense counsel's conduct with respect to the trial proceedings (i.e., whether his actions invited the announcement, whether he objected to it or demanded an instruction, or whether he refused to do so for tactical reasons). In the instant case, counsel for the defense did not request an instruction because they felt that the prejudice inherent in the prosecution's motions vitiated the effectiveness of any instruction. In fact, a corrective charge instructing the jury how to treat the dismissal may have overemphasized the incidents to the point of creating further prejudice. Therefore, the trial judge was not required to give one on his own initiative unless he felt that other circumstances made it necessary to do so. *United States* v. *King,* 505 F.2d at 607-608. He chose not to give a specific curative instruction, either immediately after the announcements or during his closing instructions to the jury. As a result, our review of the record must include an analysis of whether aggravating circumstances mandate reversal.

The trial judge made reference several times in his instructions to the jury to the presumed innocence of the individual defendants. He repeatedly urged them to consider the evidence separately as to each defendant, especially with respect to the conspiracy count. There was no intemperance shown on his part, and the record reveals that neither he nor the prosecutor did anything to adversely influence the jurors' minds. The combined factors of the trial judge's dismissal of all substantive counts and the prosecution's admitted lack of proof against two defendants may not have prejudiced DeLucca at all; rather, it may have raised doubts of his guilt in the minds of some jurors. In fact, the defense counsel highlighted the problem by referring to the case in closing arguments as, ". . . the case of the disappearing defendants." Based on our review of the record, we can find no indication of any other circumstances which aggravated the potential prejudice created by the prosecution's motions to dismiss Brown and DeLa Rosa. Accordingly, while a curative charge would have inexorably avoided the potential prejudice, the failure to give one was not plain error.

III. ***The Sufficiency of the Evidence***

In the original indictment, appellant DeLucca was charged with three criminal offenses; to wit, two substantive counts of possession with intent to distribute cocaine and one count of conspiracy to distribute cocaine. At the close of the government's case, the court *sua sponte* dismissed the two substantive counts against DeLucca, leaving only the conspiracy count. The jury subsequently found DeLucca guilty of the offense charged in the indictment. On appeal, appellant argues that his remaining count should also be dismissed because the evidence was insufficient to support the conviction.

In assessing the sufficiency of the evidence, we must view it in the light most favorable to the government. *Glasser* v. *United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States* v. *Witt,* 618 F.2d 283, 284 (5th Cir. 1980). All reasonable inferences which tend to support the government's case must be accepted and any conflicts in the evidence must be resolved in the government's favor. If the relevant evidence, viewed in the light most favorable to the government, could be accepted by a jury as sufficient to support a conclusion of the defendant's guilt beyond a reasonable doubt, then the conviction must stand. *United States* v. *Burns,* 597 F.2d 939, 941 (5th Cir. 1979).

The essence of a conspiracy is the agreement to act in concert for an illegal purpose. *United States* v. *Ochoa,* 609 F.2d 198, 201 (5th Cir. 1980). One does not become involved in a conspiracy simply by virtue of any knowledge of illegal activities and association with others who are themselves participants. In order to connect a defendant to a conspiracy, the prosecution must demonstrate that the defendant entered into an agreement with others knowingly and for the purpose of achieving an illegal objective. *United States* v. *Grassi,* 616 F.2d 1295, at 1301 (5th Cir. 1980). Participation, however, need not be proven by direct evidence; a common purpose and plan may be inferred from a pattern of circumstantial

evidence. *United States* v. *Malatesta,* 590 F.2d 1379, 1381 (5th Cir. 1979) (en banc). In addition, evidence of the knowledge and association may be combined with other circumstantial evidence to prove the necessary agreement. *United States* v. *Grassi, supra* at 1301. Thus, the initial agreement to participate in an illegal venture, as well as the actual knowledge of the plan and the association in it may be inferred from the performance of acts that further its objectives and may be proved by circumstantial evidence. See, *United States* v. *Ochoa,* 609 F.2d at 201; *United States* v. *Prince,* 496 F.2d 1289, 1293 (5th Cir. 1974); *United States* v. *Palacios,* 556 F.2d 1359, 1364 (5th Cir. 1977).

Conspiracy is by definition an inchoate offense. In order to prove the crime, two distinct intentions must be demonstrated. The evidence must be sufficient to warrant belief beyond a reasonable doubt that:

(1) the accused intentionally entered into an agreement to do an illegal act, and

(2) the accused intended to consummate that act.

United States v. *Suarez,* 608 F.2d 584 (5th Cir. 1979).

DeLucca concedes that he knew of the scheme to develop a Birmingham cocaine market, but insists that he took no part in the discussions and never entered into the agreement. The record reveals that he was present during at least two conversations in which the cocaine deal was negotiated. Although the record does not establish the exact nature of his involvement in the conspiracy, he undoubtedly knew of its existence. As a result, his intentions to consummate the illegal acts can be inferred from his agreement to enter into the conspiracy. We must, therefore, review the record in order to determine whether he did, in fact, become a partner in crime. It is apparent from the record that DeLucca knew of the conspiracy's existence from its inception. He arranged the initial meeting between Pozo and Bagley, ostensibly for the purpose of setting up a tire deal. Bagley was in need of some quick money, and Pozo had in mind a more lucrative product — cocaine.

While riding around in DeLucca's car, Pozo approached Bagley with the possibility of establishing a Birmingham "market." Although Bagley was not totally convinced of the idea, he agreed to meet with Pozo later in the afternoon, at which time they would exchange a cocaine sample. It was also agreed that "tires" would be used as a code word when discussing cocaine over the telephone. DeLucca insists that he took no part in the discussions, even though he was privy to all of the details.

Pozo's proposed meeting failed to materialize, but with DeLucca's assistance they were able to meet at his house that evening. DeLucca arranged the meeting over the phone and rendezvoused with Pozo and another man (later identified as Perez) at a convenience store, when Pozo could not find the house in the dark. Again, cocaine was the topic of conversation, and again, DeLucca insists that he took no part in the negotiations.

From these facts, we concluded that DeLucca, an experienced attorney, was a willing and informed member of the conspiracy. He got the co-conspirators together, met with them, and heard their conversations in which drugs and the feasibility of getting a large amount of cocaine delivered to Birmingham were discussed. In short, he helped put the conspiracy together. If he did not intend to take part in the conspiracy, he had a duty, as an attorney, to report the matter to the proper parties and tell the members of the conspiracy that he wanted to withdraw and have nothing to do with their plan to purchase and distribute cocaine. He could not, by remaining silent, disclaim any knowledge or responsibility for the conspiracy that was formed in his presence and hearing and with his assistance. DeLucca, as an attorney, had a high duty to take some affirmative action to defeat or disavow the purpose of the conspiracy before an overt act was committed in furtherance of the conspiracy. *United States* v. *Jimenez*, 622 F.2d 753, 755 (5th Cir. 1980). While we do not by this decision create a standard whereby an attorney can be convicted of a conspiracy which is lower than the standard for others, it

is appropriate to consider the canons of professional responsibility as a factor in determining DeLucca's willing participation in crime.[5]

DeLucca did not, at any time before or during the conspiracy, take any action to disassociate himself from it. On the contrary, he made the conspiracy possible by his indirect, yet significant participation. DeLucca offers several explanations for his actions, claiming that he acted only on the periphery. We have considered every reasonable hypothesis of his innocence, see *United States* v. *Black,* 497 F.2d 1039, 1041 (5th Cir. 1974), and find them to be unsupported by the evidence. Accordingly, viewing the evidence in the light most favorable to the government, and accepting all reasonable inferences that support the jury verdict, we find that DeLucca did, in fact, agree to enter into the conspiracy. Furthermore, he did so knowingly and with the intention of consummating an illegal act. The evidence is sufficient to support the jury's verdict.

IV. *Conclusion*

Appellants raise numerous other questions for our consideration. We have reviewed the record and find their other contentions to be without merit.

AFFIRMED.

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[5] See ABA Code of Professional Responsibility: DR1-102(A)(5); EC1-1; EC7-5; DR7-102(A)(7) and (8).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5542

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOSEPH R. DELUCCA, JULIO ENRIQUE PEREZ, JR. and MANUEL POZO, *Defendants-Appellants.*

Appeals From The United States District Court For The Northern District Of Alabama

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ON PETITIONS FOR REHEARING

(December 24, 1980)

Before VANCE and GARZA, *Circuit Judges,* and ALLGOOD,* *District Judge.*

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed on behalf of appellants, DeLucca, Perez, and Pozo, in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/S/ ILLEGIBLE
United States Ciruit Judge

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* District Judge of the Northern District of Alabama, sitting by designation.